

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

VICTOR VALLEY UNION HIGH SCHOOL  
DISTRICT, VICTOR ELEMENTARY  
SCHOOL DISTRICT AND SAN  
BERNARDINO COUNTY  
SUPERINTENDENT OF SCHOOLS.

OAH CASE NO. 2014090864

**DECISION**

Parent on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on September 23, 2014, naming Victor Valley Union High School District (High School District), Victor Elementary School District (Elementary School District) and San Bernardino County Superintendent of Schools (County). This matter was continued for good cause on October 28, 2014.

Administrative Law Judge Alexa J. Hohensee heard this matter in Victorville, California, on March 9, 10, 11, 12, 17 and 18, 2015.

Michelle Powers, Attorney at Law, represented Student. Student's father attended the hearing on behalf of Student.

Vivian E. Billups, Attorney at Law, represented all Respondents. Ms. Billups was assisted by Denise Edge, a representative of the Desert/Mountain Special Education Local Plan Area (SELPA). Tanya Benitz attended the hearing on behalf of Elementary School District, Dr. Rama Bassham attended the hearing on behalf of High School District, and Steven Vaughn, attended the hearing on behalf of County.

At the close of the hearing, a continuance to April 3, 2015, was granted for filing of written closing arguments. On that day, the briefs were timely filed, the record was closed, and the matter was submitted for decision.

## ISSUES<sup>1,2</sup>

1. Did Respondents deny Student a free appropriate public education, from September 2012 through the present, by failing to:
  - a. Conduct a functional behavior analysis;
  - b. Assess Student in the areas of assistive technology and physical therapy/adaptive physical education; and
  - c. Conduct appropriate speech and language, psychoeducational, and occupational therapy assessments?
2. Did Respondents deny Student a FAPE, from September 2012 through the date of filing, by failing to:
  - a. Have all necessary team members in attendance at the September 26, 2012 and August 16, 2013 individualized education team meetings;
  - b. Include all required content in the September 26, 2012 and January 28, 2014 IEP documents, specifically:
    - (1) Appropriate present levels of performance,
    - (2) Appropriate measurable goals,

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<sup>1</sup> The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

<sup>2</sup> In Student's closing brief, Student argues for the first time: (1) that Elementary School District was required to conduct a functional analysis assessment pursuant to Education Code, sections 56520 through 56525 and former title 5, California Code of Regulations, section 3052 (commonly referred to as the "Hughes Bill" before repeal effective July 1, 2013), for causing serious injury; (2) that County had predetermined change of placement of Student's moderate/severe classroom; and (3) that Student did not receive all speech services called for in his IEP's. These issues were not pled in Student's complaint and Respondents did not consent to amending the complaint to add them. Accordingly, the ALJ is barred from addressing these issues. (Ed. Code, § 56502, subd. (i) [party requesting the due process hearing may not raise issues at hearing that were not alleged in the complaint unless the respondent party agrees].)

- (3) A sufficient statement of supplementary aids and services,
- (4) A sufficient statement of necessary and appropriate accommodations or
- (5) A sufficient statement of the anticipated nature, location or duration of services;
- c. Provide Parent a full and complete copy of Student's educational records and his procedural safeguards; and
- d. Provide prior written notice of a change in placement in August 2014?

3. Did Respondents deny Student a FAPE, by failing to provide Student an appropriate program in Student's IEP's dated September 26, 2012 , August 16, 2013, and January 28, 2014?

### SUMMARY OF DECISION

For the reasons set forth below, all of Student's requests for relief are denied. Respondents assessed Student in all areas of suspected disability, and all assessments were appropriate. All required members of the IEP team were present or excused at the IEP team meetings at issue, with the exception of the speech teacher's unexcused absence from the September 26, 2012 IEP team meeting. The speech therapist's unexcused absence did not interfere with Parent's opportunity to participate in the IEP development process or deny Student a FAPE. The IEP documents met the legal standards, with the exception of stating the delivery model of services, which on the facts presented did not interfere with Parent's opportunity to participate in the IEP development process or deny Student a FAPE. Student received all educational records from County after a short, non-prejudicial 30-day delay due to an inadvertent address error, and Student failed to prove that the delay resulted in a denial of FAPE. The change of location of Student's classroom was not a change of placement, and Student failed to prove that the lack of prior written notice interfered with Parent's opportunity to participate in the IEP development process or denied Student a FAPE. Student did not demonstrate the IEP's dated September 26, 2012 , August 16, 2013, and January 28, 2014, failed to provide Student a FAPE.

### FACTUAL FINDINGS

#### *Jurisdiction and Background*

1. Student was 13-years-old and in eighth grade during the course of the hearing. Student was diagnosed on the autism spectrum, and at all times relevant was eligible for special education and related services on that basis.

2. Student lived with his father<sup>3</sup> and stepmother within the boundaries of Elementary School District or High School District and attended a County program at all times relevant to this proceeding.

3. Student's abilities are significantly impacted by his disability, placing him in the severe range of the autism spectrum. He is nonverbal, is not toilet trained, and requires repeated physical or verbal prompts for most activities, with frequent hand-over-hand assistance. Student makes little effort to interact with his environment or people around him, and will generally sit or stand quietly until directed to act. He often swallows food without chewing it well first, and is at risk of choking.

4. County serves students with low incidence disabilities or severe developmental delays from school districts throughout San Bernardino County. Both Elementary School District and High School District are located in San Bernardino County. County contracts with local school districts for facilities to house County classrooms. The locations of County classrooms change as the students served move within San Bernardino County or transfer to other counties or programs. A County classroom may contain students from multiple school districts. County hires special education teachers, nurses, physical and occupational therapists, speech pathologists, classroom assistants and other service providers to staff its specialized educational programs. County staff, including teachers, report to one of three County principals who oversee County programs. County staff do not report to school site principals, or to district administrators. The educational records of students in County programs are maintained by County.

#### *2012-2013 School Year*

5. Student was in sixth grade and a resident of Elementary School District for the 2012-2013 school year. Elementary School District contracted with County for Student to attend a classroom on the Columbia Middle School campus. Student's class was taught by Monica Lee.

6. Ms. Lee's classroom contained eight students with health concerns, including cerebral palsy, tracheostomies, ventilators and gastrostomy tubes. Ms. Lee was assisted by two paraeducators. A nurse and a physical therapist were often in the classroom, resulting in a ratio of students to adults of one-to-two or one-to-three. Student was the only ambulatory student in that class, and one of two or three who ate by mouth. Most of the students were nonverbal, and communicated through sounds, signs or gestures, and assistive technology.

7. Ms. Lee's class typically started with breakfast, and staff attended to students' physical needs. The class then participated in group circle time, during which students reviewed names, the calendar, weather, and upcoming activities for the week. Circle time

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<sup>3</sup> Student's father was his Parent within the meaning of Education Code section 56028 subdivision (a).

was designed to expand the students' vocabulary and elicit communication. Afterwards, students worked with the adaptive physical education teacher or the physical therapist for an hour, followed by lunch. General education students occasionally joined the class for lunch. After lunch, students participated in sensory integration activities such as finger painting, crawling through tunnels on the lawn, or using a scooter board; worked individually and in small groups on their academic goals with Ms. Lee and the paraeducators; and completed functional vocational skills. At the end of the day, Ms. Lee would read a story to the class while students took turns using the bathroom, followed by music and a song, and circle time to prepare for going home.

8. Student performed a variety of daily living tasks as his part of the classroom routine. He walked to the cafeteria to bring three lunches to the classroom on a tray; took laundry items to the laundry room next to the classroom; placed items in the washing machine; loaded and unloaded the dishwasher in the dining room; carried clean utensils and trays back to the classroom; and vacuumed the hallway outside the classroom. The switch on the vacuum went off every 20 seconds, and another student was responsible for switching the vacuum on again. Student was always supervised by a paraeducator during these activities, and given the necessary verbal and physical prompts to help him complete each activity.

9. Occupational therapy was embedded in Ms. Lee's classroom. An occupational therapist consulted with Ms. Lee to create activities and interventions to address the students' sensory needs. Ms. Lee's classroom had sensory tools and equipment. The occupational therapist created a sensory diet kit for Student. Student tapped his hands against his face and desk, and the occupational therapist recommended soft tactile objects that Student enjoyed tapping noiselessly, such as a feather duster and paint brushes. Ms. Lee's classroom had a balance beam on the floor where Student could walk to get vestibular (balance) sensory input and practice gross motor skills. Ms. Lee believed that Student's sensory needs were being met and did not interfere with learning.

10. Ms. Lee and her paraeducators worked with Student on a variety of communication devices, such as a one-button recorder, a touch screen computer, a device that recorded multiple phrases with playback buttons, picture systems with four to nine pictures or icons, and a device with one red and one yellow button to respond to yes/no and two-choice questions. Student's devices had different pictures that could be changed for different activities. For example, for lunch, the device would have pictures of a glass of milk, a tray, or a signal for "I'm all done." Student had a separate device with eight choices, including for example, "My diaper's wet," and feelings ("I'm sad," "I'm happy," "I'm hungry"), but he seemed to use it indiscriminately. Student used specialized software on a touch screen computer designed to assist him to learn colors, numbers and cause and effect.

11. Ms. Lee worked on teaching Student signs for such things as eat, drink, and more. Student was showing progress, although he did not do the signs perfectly. For example, to sign "drink" Student brought his cupped hand over his head rather than to his mouth, and for "eat" he put a flat hand to his mouth instead of a pinched hand (fingers

touching the thumb). Ms. Lee was thrilled that Student was beginning to communicate his wants, even if the gestures were imperfect. Ms. Lee was able to redirect Student to make the correct signs.

12. Student's speech pathologist, Gopal Nagasamudram, had significant training and experience in teaching students with severe language delays to use assistive technology, and used assistive technology in working with Student on his communication goals. Both Mr. Nagasamudram and Ms. Lee systematically introduced Student to a range of assistive technology devices to support Student's emerging communication.

13. At home, Student had been receiving individualized training from the Regional Center in a well-known picture exchange communication system, called PECS, since 2011. PECS allows individuals to communicate by handing over or pointing to a picture that symbolizes an item, feeling or action. PECS can be used with a wide range of "low tech" to "high tech" technologies, from picture cards attached to a Velcro strip to voice output devices with interactive screens. Pictures can be combined to make sentences, for example, using an "I want" card with a "yellow" and "crayon" card. Student's family did not attempt to keep Ms. Lee informed about the stages of Student's home PECS program, in which Student learned to pick up a picture and carry it to another person with prompting, but had difficulty comprehending the meaning of the pictures. The use of PECS requires an understanding that a two-dimensional depiction represents a three-dimensional object, an emotion, or an action. PECS also requires that the user be motivated to communicate. At hearing, Ms. Lee persuasively testified that effective use of PECS required conceptual skills higher than Student's sensor-motor and pre-conceptual thought cognitive developmental levels as identified in Student's 2010 triennial psychoeducational assessment.

14. Ms. Lee and her paraeducators regularly logged Student's progress on goals, often using applied behavior analysis techniques to teach Student. For example, in teaching Student to wipe his mouth, they used applied behavior analysis "ABCs": the antecedent (prompt), behavior (Student's action) and consequence (praise or redirection). Student's goals were broken down into component steps, and all aspects of Student's program were tracked, such as toileting, ascending and descending stairs, using the balance beam, and choosing his name from a field of two names. Student made slow but steady progress on his goals for sixth grade.

15. Ms. Lee is a credentialed and very highly qualified teacher of students with severe disabilities. She has dedicated her career to working with students with severe intellectual and physical disabilities. She has been a County teacher of severe to profound, and moderate to severe, students for over ten years. She has master's level coursework in PECS and other methods of assistive technology, and is knowledgeable and experienced in teaching emerging communication skills to nonverbal students, using assistive technology and sign language. At hearing, Ms. Lee had a calm and professional demeanor, and seemed genuinely concerned about Student's welfare. She answered all questions fully and persuasively. Her testimony concerning the huge impact on a child's life when he or she learns to communicate even the smallest of needs, and of the joy of helping a child achieve

such a breakthrough, was passionate and powerful. Ms. Lee's opinions regarding Student's performance at school, his progress and his educational needs, including assistive technology needs, were given great weight.

16. During the 2012-2013 school year, Student's stepmother contacted Ms. Lee and instructed her to stop teaching signs to Student. Student's stepmother believed that Student became confused when using signs at school and learning PECS at home, and that this inconsistency was the cause of Student's difficulty with PECS. Ms. Lee stopped instructing Student in simple signs, although she observed that Student continued to communicate requests for food and drink with the signs he had learned.

#### SEPTEMBER 26, 2012 ANNUAL IEP

17. On September 26, 2012, County convened an annual IEP team meeting. Parent, Ms. Lee, physical therapist Michele Wahl and a representative of Elementary School District attended. Student's adaptive physical education teacher and speech therapist did not attend and Parent did not excuse their attendance in writing.

18. Ms. Lee reported on Student's progress on his prior year's annual academic goals, with revised and accurate levels of performance documented in the "summary of Student's strengths" pages of that IEP. Student did not meet his science goal of sorting six manipulatives of two different shapes, but he had demonstrated the ability to match single colored objects without hand over hand assistance, and had made progress in sorting different shaped manipulatives in daily living activities such as sorting silverware. Student partially met his math goal of learning to use a picture schedule to transition between activities, although he continued to need verbal or physical prompts to consult the schedule, identify the appropriate icon and proceed to the activity. In reading, Student did not meet his goal of consistently identifying his own name in a field of two names. Student could independently hold crayons and markers and partially met his goal of tracing his name with a model by tracing the letter "N" with minimal physical assistance.

19. Ms. Lee also reported to the IEP team on Student's non-academic performance. She reported that Student was happy, playful and enjoyed affection from classroom staff. Student was well-behaved, could feed himself, put on shoes and clothes (although he needed help to zipper or tie shoelaces), and handled his classroom tasks well. Student met his daily living skills goal of sitting and voiding in the toilet, although he would also sit on the toilet without voiding and communicated that his diaper was soiled by standing up and refusing to sit down. Student communicated through eye contact, and used PECS to make choices between two items. Student was using a GoTalk4 to communicate simple phrases.

20. Ms. Lee believed that Student was making slow and steady progress in his academic and nonacademic skills commensurate with his cognitive functioning deficits, and the small changes reflected in her report to the team reflected meaningful growth. For example, the September 2012 performance report that Student "has been using a picture

schedule to help show him which task comes next...Our goal is for [Student] to be more self-directed with his picture schedule” was not just a rewording of the 2011 report that classroom staff “would like for [Student] to begin using a picture schedule,” but information that a picture schedule had been introduced and used by Student with support, and that he was able to advance to greater independence in using it.

21. Ms. Lee reported on the information provided by Student’s adaptive physical education teacher and on her observations of Student’s gross motor skills in the classroom. Student did not meet his adaptive physical education goals of increasing his core strength by balancing on one foot for 3-4 seconds, or maintaining his balance while twisting and bending his body without falling during a 30-minute adaptive physical education activity. Student could balance to turn the vacuum on with one foot, kick a ball, and carry large and small objects, but had difficulty keeping his hands out in front of him to catch objects. Student’s balance was impacted by his tendency to stand and walk on his heels with his toes raised, although he responded to verbal direction to walk with feet flat. Student had adequate fine motor skills, and could manipulate a fork or spoon very well, and hold crayons and markers independently.

22. County physical therapist Michele Wahl, presented a physical therapy discharge report to the team. She reported that Student was able to walk independently and navigate all surface terrains, ascend and descend school steps independently using a handrail, and access his education materials inside and outside of the classroom. Ms. Wahl concluded that Student’s classroom program adequately and safely addressed Student’s daily physical activity needs. She recommended that physical therapy services be discontinued.

23. Parent disagreed with Ms. Wahl’s recommendation that Student’s physical therapy should be discontinued, particularly because Student had not met his adaptive physical education goals and the adaptive physical education teacher had not been present at the IEP team meeting to discuss gross motor skills. Other members of the IEP team agreed with Ms. Wahl’s assessment.

24. The IEP team revised Student’s annual goals to address Student’s then current deficits. As Student had made partial progress on each of his goals, the team adopted new annual goals that required Student to complete more difficult tasks, or to complete tasks with less assistance or greater consistency. In physical education, Student would walk with his feet flat along a floor balance beam, and would catch a tossed or bounced playground ball with his hands and chest. In science, Student would sort by shape six objects of three different shapes. As a daily living goal, Student would indicate that he needed to use the toilet or had soiled his diaper by pushing the icon on a communication device. For math, Student would sequence by completing a classroom activity, locating the icon for the next activity on a picture schedule, transitioning to the next activity and completing the next task. For reading, Student would recognize and identify the letters of his name, and in writing, Student would trace the letters of his name when given a written model. Each goal included a percentage of time that the skill would be demonstrated during a designated trial, and was objectively measurable.



25. Discussion of Student's communication goals was deferred until the speech pathologist could be present.

26. The IEP team adopted Ms. Wahl's recommendation to discontinue physical therapy, but otherwise retained the same level of services: adaptive physical education for 20 minutes 16 times per year, and speech and language therapy for 20 minutes 32 times per year. Student was offered placement in a moderate/severe County program.

27. The printed IEP documents created by County's IEP computer software stated the type, duration and frequency of services offered. However, although the electronic IEP's on County's computer screens reflected whether the services were being delivered on an individualized, small group or consultation basis, the delivery model was not indicated on the printed IEP documents provided to parents.

28. At the end of the September 26, 2012 IEP team meeting, Parent consented to all components of the IEP, and placed his initials next to sentences stating that he had been advised, and given a copy, of his procedural rights for that school year, and received a copy of the IEP.

#### OCTOBER 10, 2012 IEP ADDENDUM

29. After the September 26, 2012 IEP team meeting, Student's speech pathologist, Mr. Nagasamudram, contacted Parent by telephone. Due to the size of San Bernardino County and the distance providers were required to travel, it was not uncommon for a member of an IEP team to be unavailable on the scheduled date. County's practice in that situation was to have the provider contact the parent before the meeting to discuss parental concerns, provide a written report to the team and reconvene the IEP team meeting when the provider was available. Mr. Nagasamudram called Parent after the meeting to report that Student had made some progress on his goal of communicating wants and needs by discriminating between two icons. Mr. Nagasamudram recommended that the new annual goal be more difficult, and require that Student communicate his wants and needs by discriminating between three icons or objects, with greater accuracy than had been previously required. However, rather than reconvening the IEP team meeting, County had Mr. Nagasamudram send an IEP addendum with the new goals to Parent, which Parent signed and returned. Parent also initialed on the IEP addendum that he had been advised of and given a copy of his procedural rights for that school year, and had received a copy of the IEP.

30. On November 26, 2012, at Parent's request, an assessment plan was prepared to determine if Student was eligible for educationally relevant occupational therapy services. Parent signed and returned the assessment plan on November 29, 2012.

31. County occupational therapist Laura Wingo conducted an occupational therapy evaluation and prepared a report dated December 12, 2012. She obtained teacher and classroom staff reports, reviewed records, and observed Student during fine motor and

visual motor tasks. Ms. Wingo reported that Student had upper body strength functional for his school needs, had no difficulty with two-handed activities, could walk around the classroom and the campus independently, had good in-hand manipulation skills, could maintain a tripod grip on a pencil when he had assistance placing it, had a functional grasp, could trace letters, could open and close school containers, cut with scissors under supervision, feed himself and drink from an open cup. Student needed assistance to use the bathroom (adjusting clothes and washing hands), manipulating clothing fasteners and tying his shoes. Student also walked on his heels with his toes raised, and per teacher report would walk flat footed with verbal reminders and was trying out ankle weights. Ms. Wingo's report concluded that Student had the skills to perform activities expected of him in the classroom, that his fine motor skills were appropriate for the school setting, and that his visual motor and self-care skills were commensurate with his cognitive abilities. Ms. Wingo did not recommend occupational therapy, and noted that an occupational therapist consulted with Ms. Lee to provide ongoing consultation for sensory strategies as needed in the classroom.

32. Around the same time as the occupational therapy assessment, Parent removed Student from Columbia Middle School because of safety concerns. A County principal made arrangements for Student's transfer to a different school. Due to the winter break and administrators' schedules, the transfer did not take place until Spring 2013, and no IEP team meeting was convened to review Ms. Wingo's occupational therapy assessment report.

#### JANUARY 15, 2013 IEP ADDENDUM

33. While a transfer was being arranged, County discovered that Student's September 26, 2012 IEP did not document the transportation services Student was receiving. Parent was mailed an IEP addendum to add transportation services, which Parent signed and returned on January 15, 2013. Parent initialed that he consented to the addendum changes without an IEP team meeting.

#### FEBRUARY 15, 2013 IEP

34. An IEP team meeting was convened between Parent and County principal Thomas Hannett on February 15, 2013, to transfer Student to a moderate/severe County classroom located on the Hesperia Junior High School campus in another school district. The February 15, 2013 addendum to the September 26, 2012 IEP did not change the type, duration or frequency of Student's related services. Parent signed the addendum, and initialed that he had been advised of, and given a copy of, his procedural rights for the school year, had received a copy of the IEP, and that parent involvement had been facilitated by the school district.

35. The program at Hesperia Junior High School was the same as the program at Columbia Junior High School. The class was taught by Nikki Christophe with the assistance of two paraeducators, one nurse and two aids assigned to particular students, for a total of six

adults in the classroom. There were 12 to 14 children in the classroom, resulting in an adult to student ratio of one-to-two. About half of the students had good communication skills, and the others could communicate unclearly and inconsistently or were nonverbal.

36. Ms. Christophe grouped her students by ability level. The students in the lower skills group, which included Student, received more adult support. Ms. Christophe's class schedule was very similar to that of Ms. Lee's class, and both occupational and physical therapy were embedded in the daily routine. Weekly adaptive physical education and speech therapy were also embedded in the program. The occupational therapist for Ms. Christophe's class recommended wrist weights, which significantly decreased Student's hand tapping. Ms. Christophe did not believe that Student needed additional occupational therapy or adaptive physical education to access the classroom or the curriculum. Student would walk with the general education students during their physical education period, accompanied by his adaptive physical education teacher. Student would promptly stop walking on his toes at the verbal prompt "walk flat."

37. PECS and a GoTalk communication device were always available to Student in Ms. Christophe's classroom, and several of his classmates were using those communication systems. Ms. Christophe consulted weekly with the speech pathologist assigned to her classroom, and worked on improving Student's ability to point to pictures of what he wanted. Student's primary modes of communication were crying or walking to what he wanted. Student had a difficult time discriminating between two different PECS pictures. He typically did not respond to a prompt to use PECS or he would randomly pick pictures. Student needed hand over hand prompting to use the GoTalk or an iPad.

38. Ms. Christophe is a highly qualified teacher with a credential to teach students with moderate to severe disabilities. She was trained in PECS, behavior modification, and applied behavior analysis methodology, and before becoming a teacher was an aide to a nonverbal student who learned to use PECS. At hearing, she had a professional demeanor, gave full and informative responses to all questions posed, and testified persuasively regarding her experience in teaching PECS to students. Ms. Christophe's opinions regarding Student's abilities, school-based performance, educational needs and progress were given great weight.

39. Ms. Christophe believed that Student made steady progress during his time in her classroom. It was her opinion that her program and staff could meet Student's educational needs, and that no assessments of Student were needed beyond his triennial assessments. She had had success in minimizing Student's tapping behavior in collaboration with the classroom occupational therapist. Ms. Christophe had not observed Student engaging in behaviors which were self-injurious, or which interfered with Student's learning or the learning of others, which could not be addressed using classroom strategies. She testified persuasively and in detail about Student's incremental progress on two sets of goals during his year and a half in her class, and her testimony that the occupational therapy, speech, nursing, assistive technology and other supports in her classroom were appropriate to meet Student's educational needs was compelling and convincing.

40. On March 3, 2013, Parent completed a Health Update noting that Student needed supervision while eating due to choking concerns.

41. On March 28, April 26, and May 14, 2013, the school nurse sent health observation forms home with Student noting minor injuries: two small bruises on the left forearm, a large red mark on the back of his hand, a bruise on the left knee and a scratch on the right forearm. Parent worried that Student might be a victim of bullying.

#### *2013-2014 School Year*

42. Student returned to Ms. Christophe's classroom for the 2013-2014 school year. Student was now in seventh grade and no longer an elementary school student. High School District, as the district of residence, assumed responsibility for the contract with County.

#### *AUGUST 16, 2013 IEP*

43. On August 16, 2013, County convened an IEP team meeting to review Student's placement. Parent, Ms. Christophe, the County principal and a representative from High School District attended.

44. At that meeting, Parent expressed concern regarding Student's level of independence. Parent told the team he wanted Student's program to have more structure, with emphasis on both academics and functional skills. The team agreed that these concerns should be taken into account during upcoming triennial psychoeducational and language assessments. The team was informed that the class on the Hesperia Junior High School campus would be closing at the end of the year, and that County was hoping to open a moderate/severe class at Lakeview Middle School as early as Spring 2014. Parent was asked to visit that campus. No change was made in placement or services.

45. Parent consented to all components of the IEP at the meeting, and placed his initials next to sentences stating that he had been advised of, and given a copy of, his procedural rights for that school year, and received a copy of the IEP. Parent also excused team members not in attendance.

46. In October 2013, in anticipation of Student's upcoming triennial IEP review, school psychologist Scott Hansen conducted a psychoeducational evaluation of Student and produced a report dated November 4, 2013. Mr. Hansen reviewed prior psychoeducational evaluations. He interviewed Parent, who stated that Student had very limited communication skills in the home, and expressed protests through vocalizations and changes in breathing. Parent wanted to see more focus on functional skills to enable Student to be as independent as possible in adulthood.

47. Mr. Hansen tested Student's cognitive and reasoning skills. He found Student at the sensori-motor stage of development, with some skills in the pre-conceptual thought range. Student scored in the extremely low range on a test of nonverbal spatial reasoning skills, and could not respond correctly to even the simplest items in one of the subtests. Parent and Ms. Christophe completed questionnaires for the Vineland Adaptive Behavior Scales, which measured personal and social sufficiency in the areas of communication, daily living skills and socialization. Student scored below the first percentile in all areas. On an informal assessment using pictures to communicate a desire for objects or edibles, Student showed good attention to task and followed directions to point to the objects (small candy and crackers, a toy car and a block). Student demonstrated the ability to point, accept an object, manipulate objects and eat edibles, but his responses did not show a strong preference for edibles or objects.

48. Mr. Hansen reported that at the outset of testing, he observed Student vigorously turning his head from side to side, screeching, and hitting the table with his hands. The frequency and duration of those behaviors declined until the last 10 minutes of testing. Student stayed in his seat for a total of 60 minutes, standing only once. During a classroom observation, Student became agitated, walked to the door, and made vocalizations when a group of children left the room. Student's agitation subsided when he was permitted to join the group outside. On the group's return, Student responded to simple verbal directions, and watched a video with occasional vocalizations and turning to gaze at other activity, but during a group picture Bingo game could not place the chips on the correct pictures, even with verbal direction. Mr. Hansen concluded from his observations that Student exhibited many characteristics of autism, including an inability to use oral language for appropriate communication, impairments in social interaction, preoccupation with, and inappropriate use of, objects, and peculiar motor mannerisms.

49. Susan McGann, Student's school speech pathologist, completed a triennial speech and language assessment of Student. She reported that Student showed poor motivation, poor attention, delayed responses and perseveration. She was unable to complete an articulation test because Student only made three sounds and would not form words. Ms. McGann found that Student had limited basic communicative functions, as needs requests were limited to food and drink (could sign for food), he inconsistently responded to his name, he refused objects by pushing them away, refused activities by walking away, and did not respond to comments or questions. Feelings were expressed nonverbally with smiles or crying. Student would attend to a speaker and stay in proximity, and seemed to enjoy physical affection. Ms. McGann concluded that Student had significant deficits in word meanings, grammar usage and social and functional use of language, but pragmatics and language were "within expectancy."

50. On or about November 2013, Regional Center discontinued Student's home-based PECS instruction because, after two years of individualized instruction, Student was unable to communicate using PECS.

51. Student's triennial IEP review, originally scheduled for September 2013, was rescheduled multiple times at Parent's request.

#### JANUARY 28, 2014 IEP

52. Student's triennial IEP review team meeting convened on January 28, 2014. Parent, Ms. Christophe, a County Principal and a High School District representative attended. Also present were assessors Mr. Hansen and Ms. McGann, school nurse Judy Christman, and a Regional Center representative. Parent provided written consent to excuse the adaptive physical education teacher.

53. Mr. Hansen presented his psychoeducational assessment report, and Ms. McGann presented her speech and language assessment report. Parent was provided with copies of each. Parent and the Regional Center representative contributed information on Student's communication in the home, which was consistent with Ms. McGann's report. The team discussed Student's lack of benefit from PECS instruction at home, and agreed that PECS could be re-introduced when Student was developmentally ready. Ms. McGann recommended a reduction in speech services, to 10 times per year for 15 minutes, to be delivered as consultation to Student's teacher. She wanted to try a "total communication" approach, in which Student's teacher and paraeducators would use multiple modes of communication to teach Student to express his needs, every day, throughout the day, in the classroom, in real time. She believed that this approach would help Student to generalize emerging communication skills more effectively than isolating him from the class for speech sessions.

54. Ms. McGann related to the team an incident she had observed where Student began crying and walked to the water cooler. He stopped crying when another student gave him a cup of water. Ms. McGann perceived the exchange as a positive attempt at communication. Parent perceived the event as an explanation for a pattern of Student coming home with a distended stomach or being sent home with diarrhea. Nurse Christman prepared a Care Plan with input from Parent and team members to monitor Student's liquid intake. Parent wanted school staff to refuse to give Student water on request. After discussion, the team agreed that the Care Plan would provide that Student be given no more than half a cup of water per request.

55. Ms. Christophe reported on Student's present levels of performance and progress on his goals. Student met his goal of sorting objects such as silverware, and using a picture schedule, albeit with verbal prompting. Student partially met his goals to recognize and identify the letters of his name and to trace his name, but he still required verbal and physical prompting. Student did not meet his goals of using a communication device or voiding in the toilet at school. Ms. Christophe had collaborated with Parent prior to the meeting, and proposed new functional goals that designed to make Student more independent. The new goals for Student were: (1) when given a box of forks, knives, spoons and napkins, to place one of each piece of silverware in a napkin and roll them up; (2) to indicate that he needed to use the toilet or was soiled, Student would walk to the bathroom

and point, or press the bathroom icon on a voice output device; (3) to void in the toilet three times per week; (4) upon arriving at school, after physical activities and during the school day, to walk to the cooler and get a cup to communicate to staff to give him water; (5) when given a specific safety sign (exit, restroom) to stand by the sign identified; (6) to carry an object of 5 to 15 pounds from one location to another with no more than two verbal prompts; and (7) to communicate his wants or needs by using a familiar gesture, action or vocalization. Each proposed goal additionally contained a means for measuring progress toward that goal. The IEP team adopted the proposed goals.

56. Parent was concerned that Student was frequently hitting himself and his desk and would injure himself. At Parent's request, the team referred Student for an occupational therapy assessment.

57. The IEP document summarized High School District's offer of FAPE: placement in the County moderate/severe program at Hesperia Junior High School, transportation, adaptive physical education retained at present levels, and speech therapy services reduced from 20 minutes 32 times per year to 15 minutes 10 times per year. Parent consented to the IEP at the end of the meeting. Parent also initialed on the IEP that he had been advised of, and given a copy of, procedural rights for the school year, had received a copy of the IEP, and that parent involvement in the meeting had been facilitated. Parent's testimony that Ms. McGann had not recommended that Student's speech services be reduced or changed at the IEP team meeting was inconsistent with Ms. Christophe's testimony and documentary evidence, and unpersuasive. Parent's testimony that he did not see the change in speech services on the IEP document, and was unaware that Student's speech services had been reduced or changed, was also unpersuasive.

58. On May 29, 2014, Student's attorney sent a records request to the Adelanto School District. Adelanto School District forwarded the letter to High School District.

59. On June 2, 2014, Hesperia Unified School District, who also received a records request, notified Student's counsel that Student's district of residence was High School District, and that Student attended a County program.

60. On June 4, 2014, High School District received Student's records request for: all evaluations; all IEP's; all health records; all cumulative records; all grades, progress reports and teacher comments; all disciplinary records; all Statewide testing results; all "confidential status logs;" all personnel and attendance records of Student and service providers; and any and all other records related to Student and maintained by High School District. High School District forwarded the request to County that same day.

61. On June 5, 2014, County mailed 54 records or categories of records to Student's counsel at the address on the letterhead of the request. A different address had been given in the narrative at the bottom of the letter. On July 7, 2014, the Post Office notified County that it had been unable to deliver the documents after three attempts. That

same day, a County staff member telephoned Student's attorney, was informed of the address error, and re-sent the documents to the correct address.

62. The County classroom on the Hesperia Junior High School campus was closed at the end of the 2013-2014 school year.

#### *2014-2015 School Year*

63. On August 8, 2014, Mr. Hannett, a County principal, prepared addendums to the IEP's of all Ms. Christophe's students, including Student, to transition them to other County moderate/severe classrooms. However, County ultimately decided that IEP addendums were not necessary, as the programs were not being changed, just moved. The addendums were never mailed. Instead, parents were advised of the change of location and transportation schedules by letter.

64. Student was assigned to the County moderate/severe classroom taught by Linda Bradley and located on the Victor Valley High School campus. The program in Ms. Bradley's class was the same as the program in Ms. Christophe's former class, but Parent was unhappy with Ms. Bradley's classroom because it was located on a high school campus. Ms. Bradley's class had 10 students, ages 13 to 21. Six students were of middle school age, four were of high school age, and one student was over 18 years of age. Half of the students were nonverbal, and the others had severe language delays. In addition to Ms. Bradley and her paraeducators, there was a full-time nurse in the classroom for one of the students.

65. Mr. Nagasamudram was the speech pathologist assigned to provide embedded speech services to Ms. Bradley's classroom, and to provide consultation to Ms. Bradley per Student's January 28, 2014 IEP. Mr. Nagasamudram is a highly qualified and credentialed speech language pathologist, with extensive experience working with students with autism and severe language delays. Mr. Nagasamudram observed that Student benefitted more from real time practice communicating his wants and needs than he had in the therapy room, particularly as Student had demonstrated a lack of motivation to interact with his speech pathologists while isolated with them. Mr. Nagasamudram found that the change in services from direct speech therapy to consultation with Student's teacher was an effective means of implementing a total communication approach in which Student utilized multiple modes of speech (vocalization, switches, gestures, signs) with the support of all classroom staff every day, all day. Mr. Nagasamudram was of the opinion that a total communication approach was more effective in eliciting functional language from Student, and that the level of services offered in the January 28, 2014 IEP provided Student with educational benefit.

66. Parent thought that his son should be interacting only with middle school children his own age, and not with high school students or adults. On September 23, 2014, Student filed a due process hearing request with OAH.



### *Student's Experts*

67. On October 7, 2014, in anticipation of the due process hearing, Parent retained Julie Sanchez to conduct a behavioral assessment of Student and to assess the efficacy of the current level of supports in Ms. Bradley's classroom. Ms. Sanchez had been the supervisor of Student's home-based PECS program for a few months before the program was discontinued. She conducted tests of Student's behavior in her office, and observed the classroom for two and a half hours at the end of a school day in fall 2014.

68. Ms. Sanchez reviewed old records from Student's home based program. Ms. Sanchez believed that Student had made progress with individualized home-based instruction, although Student's lack of motivation made it difficult to implement an applied behavior analysis strategy.

69. Ms. Sanchez administered the Vineland Adaptive Behavior Scales to Student, the same instrument administered by Mr. Hansen in October 2013. Student again scored below the first percentile in communication skills, daily living skills, socialization and motor skills, at age equivalents of five months to two years and 10 months (motor skills). She also administered the Verbal Behavior Milestones Assessment and Placement Program, based upon a questionnaire completed by Parent and her observations, which indicated that Student had many barriers to learning, including defective requesting skills, defective listening skills, defective social skills, prompt dependency, failure to generalize, and weak motivators, among others. In the classroom, Ms. Sanchez saw Student tapping the table and himself, and observed that Student could follow simple instructions and classroom routines with minimal supervision, but required one-to-one support for novel tasks. Ms. Sanchez opined that Student required a one-on-one aide trained in applied behavior analysis, in the home if not also at school.

70. Ms. Sanchez is a board certified behavior analyst and a well-qualified behavioral expert. However, in preparing her assessment, she did not speak to Student's teacher beyond a casual greeting, did not review Student's IEP's, did not review Student's school-based assessments, and observed Student only during non-academic activities at the end of his school day. She did not obtain information on Student's then-current home program, and relied heavily on his stepmother's report of Student's abilities. In preparing for hearing, she read the triennial 2013 psychoeducational and occupational therapy assessment reports, Student's September 2012 and August 2013 IEP's, the physical therapy discharge report and a 2015 private occupational therapy report. Ms. Sanchez's conclusions about the efficacy of the current supports provided in Ms. Bradley's classroom, about which she knew almost nothing, were given very little weight. Her opinion on Student's learning style and educational needs were based in large part on her review of reports in fields outside of her expertise, parental report, and stale in-home program information, and was given less weight than that of the credentialed educators who had worked with Student, Ms. Lee and Ms. Christophe. Her opinion that Student was making good progress with in-home PECS instruction using applied behavior analysis methodology, despite an inability to effectively use PECS after two years of such instruction and a plethora of evidence that Student's

delayed developmental levels allowed only a rudimentary understanding of components of the PECS system, was unpersuasive. Her testimony concerning her testing and observations of Student was given due weight, but was generally consistent with that of Respondents' witnesses.

71. Shawn Kenyon also observed Student in October 2014. Mr. Kenyon is the vice president of clinical services for a nonpublic school that serves children at the severe end of the autism spectrum. He observed Student for 90 minutes in Ms. Bradley's classroom and at lunch. Parent told Mr. Kenyon that his biggest concern was Student's behavior of hitting himself, which Parent believed was self-injurious. Mr. Kenyon observed that Student stayed at his desk, except to retrieve something he dropped and to go to the restroom with staff, and worked independently on activities with puzzles and blocks. At hearing, Mr. Kenyon opined that Student displayed many positive skills, such as staying seated, retrieving what he wanted, returning to his desk and reengaging in an activity without prompting, and working independently. He described Student as having many body parts in perpetual motion, such as shaking his head and tapping objects against his face, but he did not discern Student using any force, and opined that Student's movements were not self-stimulatory or self-injurious, but a form of motor stereotypy. Motor stereotypy is not caused by a reaction to the environment, such as seeking to gain access to a preferred item or keeping an item from being taken away, and tends to occur across all environments, like a tic or tapping a foot. Mr. Kenyon recommended addressing the motor stereotypy to see if it could be decreased, but he did not think it interfered with Student's learning, and did not think a functional behavioral analysis was warranted. In his experience, a functional behavior analysis, which focuses on antecedents and consequences of behavior, would not yield much information on motor stereotypy. He opined that the District's program was appropriate based upon his observation.

72. Mr. Kenyon is an extremely well qualified and extensively published behavior expert. He has a master's degree in psychology, and has been a board certified behavior analyst for almost ten years, with most of that experience in the school setting. Mr. Kenyon candidly limited the basis of his opinions to one classroom observation. He thoughtfully answered all questions, and his testimony was enlightening and informative. Mr. Kenyon's impressions of Ms. Bradley's classroom and Student's needs as observed in that classroom, were given significant weight.

73. Student's adult stepsister accompanied Mr. Kenyon and testified at the hearing. She is also a board certified behavior analyst, with experience primarily, although not exclusively, with in-home services. Student's stepsister cares for Student several times a month, but is not familiar with Student's school program, did not conduct a functional behavior analysis of Student, and did not review Student's records. She is a strong proponent of using applied behavior analysis methodology with children who are still building communication skills, and opined that Student should be taught with applied behavior analysis methodology. In her opinion, Student tapped/hit himself excessively, and she worried that he might hit his throat hard enough to do serious self-injury. She also opined that Student required a one-on-one aide to access his curriculum, teach him PECS and

prevent Student from injuring himself. Her testimony included broad generalizations and speculation with the result that her conclusions regarding Student's needs appeared exaggerated and were unpersuasive. Her opinions on Student's educational needs and the components of an appropriate educational program to meet those needs were given very little weight.

74. On February 24, 2015, Parent retained Belinda Williams to conduct a private speech and language evaluation of Student. Student was unable to produce a single word on a standardized test of expressive vocabulary, and did not respond to Ms. Williams, despite repeated models and prompting, on any item of a standardized receptive language test. Ms. Williams then attempted a play-based developmental language test normed for preschoolers, although Student is 13 years of age. Student did not demonstrate relational, self-directed or pretend play skills; he did not identify familiar objects; and he did not follow gestural cues, which are typical auditory comprehension skills of a two-year-old. Student obtained an age-equivalence score of six months in a test of expressive communication. Ms. Williams attempted to administer the same articulation test that Susan McGann had attempted in September 2013, but like Ms. McGann, could only obtain three sounds from Student and no words for scoring purposes.

75. Student demonstrated joint attention when requesting a highly motivating object, such as water, and could approximate the sign for "drink." He also communicated by reaching for a cup of water placed out of reach. Student responded to the simple command "give me," but did not discriminate between the objects he handed to the assessor in response to that command. Ms. Williams was unable to complete an oral motor examination because Student would not imitate movements, such as puffing cheeks or moving his tongue up or down. Ms. Williams concluded that Student demonstrated significant delayed receptive and expressive vocabulary skills, oral language skills, play skills and articulation skills, and recommended speech and language therapy for 30 minutes twice a week, using a "total communicative approach" incorporating nonverbal communication, such as assistive technology and gestures. As clinical goals, she recommended that Student (i) demonstrate joint engagement in simple games, (ii) request highly-preferred items with a gesture, (iii) greet others with a gesture, such as a wave, and (iv) identify familiar objects.

76. Ms. Williams is a well-qualified speech language pathologist. However, she was not asked to evaluate Student's school-based program, and did not review Student's IEP's, his school-based assessments, speak to his teacher or observe his classroom. Although her test results were given significant weight, her recommendations for speech services and goals, made without information on Student's educational program and current supports, were not.

77. On February 24, 2015, Parent retained Dawn Arias, an occupational therapist, to assess Student in anticipation of the due process hearing. Parent reported that Student's teachers were not placing demands on Student, and worried about Student's hand strength, dexterity, flexibility for sign language, and tapping.

78. Ms. Arias attempted to conduct a standardized test of visual motor integration, but as Student was unable to follow her directions, she instead relied on observations. Student could hold a writing instrument and make a mark on paper, and draw lines with hand-over-hand assistance. Student removed marker caps with some difficulty, but then colored for five minutes. When Student put the marker up to his face, Ms. Arias was able to redirect him with verbal and minimal physical prompting. Student had the fine motor strength to pull apart suction cups and was able to string large beads. Ms. Arias administered a sensory profile, consisting of a questionnaire completed by Parent. Per Parent's responses, Student had difficulty with touch, auditory, multisensory and vestibular input; and had difficulty responding appropriately to social or environmental cues. Ms. Arias recommended having Student's teacher complete a sensory profile to get a depiction of Student's sensory needs in the educational environment.

79. Ms. Arias concluded that Student would benefit from increasing his fine motor strength and dexterity, and from a sensory diet throughout the day. She recommended 30 minutes per week of occupational therapy be "pushed in" to Student's classroom, and that Student's teacher receive 30 minutes per month of occupational therapy consultation to implement a sensory diet. She recommended assessments by a behavioral therapist, and for a communication device. She recommended as occupational therapy goals that Student (i) improve fine motor and dexterity to independently open all containers required for educational activities, (ii) improve his tolerance for classroom activities, and (iii) improve his ability to attend and decrease stimming behaviors with a sensory diet.

80. Although Ms. Arias is a highly qualified occupational therapist, she was not familiar with Student's educational program and provided Parent with clinical, not school-based, recommendations. Therefore, her opinions on Student's educational needs, particularly in the classroom, were accorded little weight.

#### *Respondents' Occupational Therapist*

81. At hearing, Respondents called County occupational therapist Crystal Pollard to interpret Ms. Wingo's December 2012 occupational therapy evaluation report, as well as an occupational therapy assessment of Student from 2010. Ms. Collard is a highly qualified, nationally certified occupational therapist, with experience working with children with moderate to profound disabilities. She was the occupational therapist consulting with Ms. Bradley's classroom during the 2014-2015 school year, and was familiar with Student and his fine motor and visual motor integration needs from her review of Student's records and her observations of him in Ms. Bradley's classroom. Ms. Collard's opinions concerning Student's fine motor and visual motor integration skills and needs in the school setting were given significant weight.

82. In Ms. Collard's opinion, Student is, and at all times at issue has been, able to participate in his class with the embedded occupational therapy supports provided in Student's moderate/severe County programs. Student's programs have all had occupational therapists in the class regularly to support the teacher and staff, answering questions and

offering strategies, modifications and sensory tools that can be implemented in the classroom on a daily basis to meet Student's needs. Student is able to hold a pencil with a functional tripod grasp, he can do hand over hand tracing and is beginning to form letters himself, and can adequately handle manipulatives. Student has good visual attention for fine motor tasks, can put on his backpack and shoes independently, and can zip his jacket up and down if the zipper is lined up for him. Student has full flexibility and full range of motion. Ms. Pollard has observed Student knocking the desk with his fingers curled, and occasionally rocking his head, but he will stop with one verbal prompt. She consults with Ms. Bradley to provide Student with a sensory diet as well as sensory breaks, and these strategies have helped Student focus on classroom tasks. In her opinion, Student does not, and has not, required individual occupational therapy to meet his educational needs.

83. Ms. Collard noted that Ms. Arias conducted a clinical assessment using a medical model, which looks at strength, flexibility, gross motor skills and sensory diets for the home, but does not provide educationally relevant information on barriers to education. Ms. Collard believed that the areas addressed by Ms. Arias' proposed goals were already being addressed by Student's educational program. For example, Student already demonstrated an ability to tolerate classroom activities for over ten minutes, Student's sensory breaks and diet decreased his tapping and fidgeting behaviors, and Student possessed the hand strength to access classroom materials. Ms. Collard did not see any new information about Student in Ms. Arias' report, and noted that the report itself referred Parent to Student's teacher for more information regarding Student's ability to access the school environment. Ms. Collard did not see a need for further occupational therapy assessment, as Student's needs were being met by his classroom programs.

## LEGAL CONCLUSIONS

### *Introduction – Legal Framework under the IDEA<sup>4</sup>*

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) et seq.<sup>5</sup>; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

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<sup>4</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>5</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic, and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit," or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request.

(20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

### *Issue 1: Assessments*

5. Student contends that Respondents denied Student a FAPE by failing to conduct a functional behavior analysis and assessments in the areas of assistive technology and physical therapy, that Respondents ignored Parent's request for assessments, and that the assessments that were conducted failed to meet statutory requirements. Respondents contend that Student was appropriately assessed in all areas of suspected ability and the speech and language, psychoeducational and occupational therapy assessments met statutory requirements.

### APPLICABLE LAW

6. Special education law references “initial evaluations” (20 U.S.C. § 1414(a)(1)(A); 34 C.F.R. § 300.301; Ed. Code, § 56320), and “reevaluations.” (20 U.S.C. § 1414(a), (c); 34 C.F.R. § 300.303; Ed. Code, § 56381, subd. (a)(1).) “An initial evaluation is the first complete assessment of a child to determine if the child has a disability under the IDEA, and the nature and extent of special education and related services required. Once a child has been fully evaluated. . . any subsequent evaluation of that child would constitute a reevaluation.” (71 Fed.Reg. 46640 (Aug. 14, 2006).) California law refers to a reevaluation as a “reassessment.” (Ed. Code, § 56381.)

7. A district must conduct a reassessment if it “determines that the educational or related service needs, including improved academic achievement and functional performance, of the child warrant a reevaluation,” or if the student’s parents or teacher request a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); see also Ed. Code, § 56381, subd. (a)(1).) A reassessment shall occur not more frequently than once a year, unless the parent and the district agree otherwise, and shall occur at least once every three years, unless the parent and the district agree, in writing, that a reassessment is unnecessary. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).)

8. An IEP team must generally consider whether a child’s behavior impedes his learning or that of others. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i)(2006); Ed. Code, § 56341.1, subd. (b)(1).)

9. A school district’s failure to conduct appropriate assessments, or to assess in all areas of suspected disability, may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District* (9th Cir. 2006), 464 F.3d 1025, 1031-1033.) In the event of a procedural violation, a denial of FAPE may only be found if that procedural

violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).)

## ANALYSIS

### *ISSUE 1(a): FUNCTIONAL BEHAVIOR ANALYSIS*

10. The weight of the evidence did not establish that Student's head rolling and hand and foot tapping behaviors were self-injurious. All witnesses, with the exception of Student's family members, testified that Student's head rolling and hand tapping behavior was not done with sufficient strength to cause harm. The family member's testimony to the contrary was not persuasive. Mr. Kenyon, who was the most experienced of the three board certified behavior analysts who testified, described Student's face tapping with an object to be very light, on par with someone tapping their finger against their lips in thought. Mr. Kenyon opined that the only harm to Student he could envision from the tapping he observed would be calluses on Student's fingers. Mr. Kenyon persuasively defined self-injurious behavior as having a discrete beginning and a discrete end (such as a bite), socially mediated to gain or escape a consequence. He persuasively opined that Student was engaging in motor stereotypy rather than self-injurious behavior.

11. The weight of the evidence did not establish that Student engaged in behaviors that impeded his learning or that of others. Multiple witnesses testified persuasively that Student would stop tapping his hands and feet with a verbal prompt. The occupational therapists consulting in Student's classrooms provided soft items for Student to tap as part of a sensory diet, and Student's teachers testified that Student was quiet, did not disrupt other students, and stayed at his desk unless participating in classroom routines or outside activities. Ms. Sanchez and Mr. Kenyon observed that Student could attend to task, follow classroom routines and communicate simple wants and needs (like joining classmates outside by walking to the door) while engaging in head rolling and hand or foot tapping, which was consistent with Mr. Kenyon's opinion that Student's motor stereotypy did not interfere with Student's own learning.

12. Mr. Kenyon opined convincingly that children who engage in motor stereotypy engage in the action for the sake of the action itself, and that a functional behavior analysis rarely provides useful information on motor stereotypy. Student's head rolling and hand tapping were not self-injurious, they did not interfere with his learning or that of others, and a functional behavior analysis would have provided no significant information on this form of motor stereotypy. Therefore, a functional behavior analysis was not required.

13. Parent's statement to the August 16, 2013 IEP team that his son's educational program required more structure did not constitute a parental request for applied behavior analysis services or a functional behavior analysis.



*ISSUE 1(b): ASSISTIVE TECHNOLOGY*

14. The weight of the evidence did not establish that Student required an assistive technology assessment. There was no evidence Student had any unmet functional communication needs that required assessment. The testimony of Ms. Lee, Ms. Christophe and Mr. Nagasamudram established that Student was provided a range of low-tech and high-tech assistive technology in the County classrooms, with credentialed teachers experienced in teaching nonverbal students to use that technology to acquire functional communication skills. Student's instruction on a variety of assistive technology devices adequately supported his emerging functional communication skills. The recommendation of Ms. Williams, who does not have expertise in assistive technology, to explore whether new communication modes might benefit Student did not establish that Student required additional, or different, assistive technology to access his educational program. Similarly, Ms. Sanchez's opinion that Student could learn to use PECS more effectively was based on the questionable results of discontinued two-year trial, did not take into account other assistive technology support available to Student in the classroom or Student's developmental level, and was ultimately intended as a recommendation for home-based, rather than school-based, PECS instruction.

*ISSUE 1(b): PHYSICAL THERAPY/ADAPTIVE PHYSICAL EDUCATION*

15. The weight of the evidence did not establish that Student required physical therapy or adaptive physical education assessments. Student did not establish that he had unmet gross motor needs that required physical therapy or adaptive physical education. Parent's observations that Student has poor balance and frequently stabilizes himself by holding onto Parent's arm, or that Student cannot catch a ball, fell short of demonstrating that Student required school-based physical therapy or additional adaptive physical education to access his education. Ms. Wahl's physical therapy discharge report concluded that Student's educational experience was not adversely impacted by decreased function, or by a lack of age-appropriate motor ability. Student made slow but steady progress on his adaptive physical education goals each year, and accessed both the classroom and school campus during daily life skill activities, such as carrying trays from the cafeteria, taking items to the laundry room, vacuuming the hallway, or joining his classmates outside the classroom. The testimony of Ms. Lee and Ms. Christophe regarding the 2012-2013 and 2013-2014 school years, and the observations of Ms. Sanchez and Mr. Kenyon during the 2014-2015 school year, persuasively demonstrated that Student was accessing the classroom and his school environment without the need for physical therapy or increased adaptive physical education.

*ISSUE 1(c): TRIENNIAL SPEECH AND LANGUAGE AND PSYCHOEDUCATIONAL ASSESSMENTS*

16. Respondents conducted appropriate triennial speech and language and psychoeducational assessments.

17. Ms. McGann and Mr. Hansen were knowledgeable of the student's disability and competent to perform their assessments. (Ed. Code §§ 56320, subd. (g); 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) They used technically sound testing instruments (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3)) and a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) Their assessments were sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304(c)(6).)

18. There was no evidence that any of the assessments were selected or administered in such a way as to be discriminatory on a racial or cultural basis. All of the assessments were conducted in a language and form most likely to yield accurate information as to what Student could do academically, developmentally, and functionally. There was no evidence that the assessment tools were not used for purposes for which the assessments were valid and reliable or administered in accordance the producer's instructions. (See 20 U.S.C. § 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).)

19. Ms. McGann and Mr. Hansen each prepared a written report that included Student's needs for special education and related services. Each report described Student's relevant behavior in an appropriate setting and the relationship of Student's behavior to his academic and social emotional functioning. The psychoeducational report included educationally relevant health information. (See Ed. Code, § 56327.) The speech and language and psychoeducational reports were provided to Parent at the IEP team meeting on January 28, 2014. (Ed. Code, § 56329, subd. (a)(3).)

20. The IEP team considered the speech and language and psychoeducational assessments in determining the Student's educational program during the January 28, 2014 meeting. (34 C.F.R. § 300.324(a)(1)(iii)).

21. The evidence did not show that Respondents failed to identify any of Student's speech and language needs during the time frame at issue. Parent's private speech assessor, Ms. Williams, found that Student demonstrated significant delayed receptive and expressive vocabulary skills, oral language skills, play skills and articulation skills, but these same deficits had been identified by Respondents. Ms. Williams' test results were consistent with those of Ms. McGann, and did not demonstrate that Respondents would have uncovered unidentified speech and language needs had further assessments been completed.

22. Ms. Williams was critical of the form and content of Ms. McGann's written report. While Ms. McGann's report was skeletal and poorly written, it nonetheless met the minimum requirements of the IDEA, in that it found that Student required special education and related services, stated the basis for that determination, listed relevant behavior noted during observation, commented on the relationship of that behavior to the student's academic and social functioning, and noted Student's educationally relevant health, development and medical findings. (Ed. Code, § 56327.) Student presented no evidence that Ms. McGann's

report should have included a determination of the effects of environmental, cultural, or economic disadvantage, or a statement regarding the need for specialized services, materials or equipment. (*Id.*)

23. The evidence did not show that Respondents failed to identify any of Student's needs in the areas commonly addressed in a psychoeducational assessment: cognitive, academic or social emotional. No evidence was produced that the triennial psychoeducational assessments conducted by Elementary School District in 2010, or by High School District in 2014, inaccurately or insufficiently identified Student's cognitive developmental levels at the sensori-motor and pre-conceptual thought range. The assessments of Ms. Arias and Ms. Sanchez were consistent with Respondents' psychoeducational assessments in generally finding Student's abilities, in speech and behavior respectively, to be equivalent to those of children less than one year of age with the exception of motor skills. All reports were that Student was happy and affectionate in school, and cried only as a nonverbal indication of a want or need, such as seeking water to drink or the change of a soiled diaper. Student made slow but incremental progress consistent with his developmental levels. The credentialed teachers uniformly testified that Student's academic and social emotional needs were being met by Student's educational program. Student presented no persuasive evidence that Student had unidentified cognitive abilities, or unidentified academic and social emotional needs.

24. In conclusion, the evidence established that the triennial speech and language and psychoeducational assessments were appropriate.

*ISSUE 1(c): OCCUPATIONAL THERAPY*

25. The evidence did not show that Respondents failed to identify educationally related needs for occupational therapy or sensory integration that would warrant reassessment of Student. Student's private occupational therapist, Dawn Arias, concluded that Student could strengthen his fine motor strength and dexterity to better access classroom materials and perform classroom tasks, but a school district is not required to maximize a student's potential. (*Rowley, supra*, 458 U.S. at p. 200.) Student's November 2010 triennial occupational therapy evaluation report and Ms. Wingo's December 2012 occupational therapy evaluation report had already noted Student's fine motor deficits, and concluded that Student had sufficient strength and dexterity to independently access classroom materials.

26. Ms. Arias reported that Student had difficulty processing touch, auditory information, multisensory information and vestibular (movement) sensory information, which mirrors the findings of Elementary School District's November 2010 occupational therapy assessment report. The County classrooms attended by Student had embedded occupational therapy and occupational therapy consultation throughout the school year, and Ms. Lee, Ms. Christophe and Ms. Collard testified persuasively that Student's sensory needs were identified and appropriately addressed in the classroom.

27. Ms. Arias criticized the December 2012 occupational therapy evaluation report for failing to include standardized assessments, but Ms. Arias herself was unable to complete the standardized tests she attempted with Student, and she did not persuasively testify that information on unsuccessfully attempted tests would have provided new information on Student's fine motor and motor integration needs.

28. In summary, Student did not meet his burden of proving by a preponderance of the evidence that reassessments of Student were required in the areas of functional behavior, assistive technology, physical therapy, adaptive physical education, psychoeducation (cognitive development, academic performance or social emotional functioning), speech and language or occupational therapy, or that the assessments performed by Respondents were legally insufficient.

*Issue 2(a): Attendance at the September 26, 2012 and August 16, 2013 IEP Team Meetings*

29. Student contends that he was denied a FAPE because Respondents did not have all necessary members in attendance at the September 26, 2012 and August 16, 2013 IEP team meetings. Respondents contend that the attendance of the absent members was not required, or in the case of the speech pathologist's absence, did not result in a denial of FAPE because the speech pathologist discussed Student's progress and proposed speech goals with Parent in a telephone call.

APPLICABLE LAW

30. An IEP team is composed of the parents; at least one regular education teacher if the pupil is, or may be, participating in the regular education environment; at least one special education teacher or, if appropriate, at least one of the student's special education providers; a qualified person to interpret assessments; and other persons who have knowledge or special expertise regarding the student, at the discretion of the parent or school district; and the child, whenever appropriate. (20 U.S.C. § 1414(d)(1)(B); Ed. Code, § 56341, subd. (b).) Further, it is within the discretion of the school district to determine which of its personnel will fill the roles for the district's required participants at the IEP meeting. (71 Fed.Reg. 46674 (Aug. 14, 2006).) The regular education teacher who is a member of the IEP team need not be the child's current regular education teacher. (*R.B. v. Napa Valley Unified Sch. Dist.* (9th Cir. 2007) 496 F.3d 932, 939.) A member of the team shall not be required to attend the meeting, in whole or in part, if the parent and school district agree, in writing, that the attendance of the member is not necessary because the member's area of curriculum or related services is not being modified or discussed in the meeting. (Ed. Code, § 56341, subd. (f).) A member of the team whose area of curriculum or related services is being modified or discussed may also be excused by written parental consent if the excused member submits a written report to the IEP team in advance. (Ed. Code, § 56341, subd. (g)(1), (2).)

## ANALYSIS

31. Student was not participating in the regular education environment in September 2012, and therefore a general education teacher was not required to be present at the September 26, 2012 IEP team meeting. Ms. Lee, Student's special education teacher, was present at the meeting.

32. The attendance of Ms. Wahl, Student's physical therapist and assessor, met the requirement that at least one of Student's special education providers attend the meeting. Ms. Wahl presented her physical therapy discharge report and discussed Student's gross motor abilities and performance with the IEP team. The attendance of Student's adaptive physical education teacher was not necessary as Ms. Wahl was available to answer all Parent's questions regarding Student's gross motor skills and his ability to access the school environment. Parent did not request that the adaptive physical education teacher contact him, although he expressly requested follow up regarding both speech and occupational therapy services. Student did not demonstrate that he had any unidentified gross motor deficits. The weight of the evidence did not establish that the adaptive physical education teacher was required to attend the September 26, 2012 IEP team meeting, or that the absence of this service provider impeded Student's right to a FAPE, significantly impeded Parent's opportunity to participate in the decision making process regarding the provision of a FAPE, or caused deprivation of educational benefits.

33. It was County practice for a service provider to contact a parent telephonically if they could not attend an IEP team meeting. Mr. Nagasamudram's recollection of the conversation with Parent was more credible and persuasive than Parent's, and was consistent with the information contained in the contemporaneous IEP addendum consented to by Parent. In that call, Parent was informed of Student's progress on his September 2011 annual goal, and Parent provided input for development of the proposed goal. Mr. Nagasamudram had previously updated Student's present levels of performance in the September 29, 2012 IEP document for the IEP team. After the telephone conversation, Mr. Nagasamudram provided Parent with an IEP addendum that proposed a new annual communication goal developed with Parent's input and recommended continuation of services, to which Parent consented. Although Mr. Nagasamudram did not have written consent to be excused from the IEP team meeting, his update to the team, coupled with his subsequent conversation with Parent and written documentation, otherwise met the requirements for a service provider whose services are to be modified or discussed at the IEP team meeting to be absent from the meeting. The failure of Elementary School District to obtain Parent's consent to the excusal of Mr. Nagasamudram in writing was a procedural violation of the IDEA, but on these facts, Parent's opportunity to participate in the decision making process regarding the provision of a FAPE to Student was not significantly impeded, and Student was not deprived of educational benefit or denied a FAPE.

34. As to the August 16, 2013 IEP, Student's adaptive physical education teacher and speech pathologist were not present, but Parent excused their attendance in writing. Therefore, their absence did not constitute a procedural violation.<sup>6</sup>

35. Student did not meet his burden of proving that Student was denied a FAPE due to the absence of team members at the September 26, 2012 or August 16, 2013 IEP team meetings.

*Issue 2(b): Content of September 26, 2012 and January 28, 2014 IEP documents*

36. Student contends that Respondents failed to include complete information in the September 26, 2012 and January 28, 2014 IEP documents. Specifically, Student contends that the IEP's lack (i) appropriate present levels of performance, (ii) appropriate measurable goals, (iii) a sufficient statement of supplementary aids and services, (iv) a sufficient statement of necessary and appropriate accommodations or (v) a sufficient statement of the anticipated nature, location or duration of services. Respondents contend that their IEP documents were sufficient.

APPLICABLE LAW

37. An IEP is a written document detailing, in relevant part, the student's current levels of academic and functional performance, a statement of measurable academic and functional goals, a description of the manner in which goals will be measured, a statement of the special education and related services that are to be provided to the student and the date they are to begin, the anticipated frequency, location and duration of services and modifications, an explanation of the extent to which the child will participate with nondisabled children in a regular class or other activities, and a statement of any accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a).)

38. An annual IEP must contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).) Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (Letter to Butler, 213 IDELR 118 (OSERS 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).)

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<sup>6</sup> The names of the missing members are not separately set forth in the IEP document, but Parent testified that he initialed the document after the meeting, and so would have known the specific team members whose absence he excused.

39. In addition, the IEP must include “appropriate objective criteria, evaluation procedures, and schedules for determining, on at least an annual basis, whether the annual goals are being achieved,” and a statement of how the student’s progress toward the goals will be measured. (Ed. Code, § 56345, subd. (7), (9); 20 U.S.C. § 1414(d)(1)(A)(i)(III).) An examination of an IEP’s goals is central to the determination of whether a student has received a FAPE. In *Adams v. State of Oregon* (9<sup>th</sup> Cir. 1999) 195 F.3d 1141, the court stated: “[W]e look to the [IEP] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer ... a meaningful benefit.” (*Adams, supra*, 195 F.3d at p. 1149.)

40. *Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519 (*Union*) held that an offer of FAPE must be formal and in writing to eliminate troublesome factual disputes.

41. The IDEA mandates that special education and related services, and supplementary aids and services, be based upon peer-reviewed research to the extent practicable. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. 300.320(a)(4).) The phrase “to the extent practicable” means that supports and services should be based on peer-reviewed research to the extent that it is possible, given the availability of peer-reviewed research. (71 Fed. Reg. 46,665 (Aug. 16, 2006).)

42. An IEP must describe the services offered and their anticipated frequency, location and duration of services. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a).)

43. In the event of a procedural violation, a denial of FAPE may only be found if that procedural violation impeded the child’s right to a FAPE, significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a FAPE, or caused deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).)

## ANALYSIS

### *ISSUE 2(b)(i): PRESENT LEVELS OF PERFORMANCE*

44. The weight of the evidence did not establish that the present levels of performance reported in the September 26, 2012 IEP were inaccurate or incomplete. Although communication and reading levels in the September 26, 2012 IEP were virtually unchanged from the prior year on the goal pages of the IEP, revised and accurate levels of performance in all areas are documented elsewhere in the IEP. Ms. Lee testified persuasively that Student was making slow and steady progress commensurate with his developmental level, and the small changes in acquired skills documented in the IEP represented meaningful growth. Ms. Lee also testified persuasively that Student was well-behaved in the classroom, and therefore the IEP’s lack of mention of Student’s tapping behaviors did not render the report incomplete in the area of behavior. The present levels of performance, as set forth on both the goal pages and the strengths summary, were concise and clearly understandable, and sufficient for Student’s progress to be evaluated.

45. The weight of the evidence did not establish that the present levels of performance reported in the January 28, 2014 IEP were inaccurate or incomplete. Ms. Christophe reported on Student's classroom performance and updated functional goals drafted in consultation with Parent, and Mr. Hansen and Ms. McGann presented their assessments of Student, which were extensively documented in the notes section of the IEP. The IEP also documented the report of a Regional Center representative on Student's in-home PECS instruction, and the discontinuance of that program. The information contained in the January 28, 2014 IEP concerning Student's present levels of performance was concise, clearly understandable, and sufficient for Student's progress to be evaluated.

*ISSUE 2(b)(ii): APPROPRIATE AND MEASURABLE GOALS*

46. The weight of the evidence established that the annual goals in the September 26, 2012 IEP were appropriate and measurable. The IEP team had sufficient information regarding Student's needs from the 2010 comprehensive triennial assessments and the reports of Student's present levels to identify Student's areas of educational need, including gross motor skills, fine motor skills, academics, and functional communication. The IEP team drafted and adopted goals to address those needs, including balance skills, the ability to catch a ball, distinguishing between similar and dissimilar objects, communicating wants and needs, toileting, concepts of linear time and sequence, and recognizing and writing his name.

47. Student had the burden of persuasion to establish that Elementary School District proposed inadequate goals to meet his unique needs, but failed to do so. None of Student's experts testified about the offered goals in the September 26, 2012 IEP or gave an opinion that those goals failed to address any of Student's unique needs. Ms. Lee and Mr. Nagasamudram explained persuasively what Student's unique needs were, his present levels of performance, and how the goals would permit Student to make meaningful educational progress.

48. The weight of the evidence established that the annual goals in the January 28, 2014 IEP were appropriate and measurable. Ms. Christophe drafted the goals after having Student in her classroom for almost a full year and collaborating with Parent, and the proposed goals were adopted by the IEP team only after discussion and consideration of the triennial psychoeducational and speech assessments. Ms. Sanchez and Student's stepsister were critical of the goals in this IEP because they did not employ the applied behavior analysis strategy of motivators or "reinforcers," but the law does not require a school district to specify the methodology that will be used within the goals, and as long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 208.) Ms. Sanchez's opinion that Student's visual discrimination is an area of deficit supported, rather than made inappropriate, Student's functional goal of learning to sort and wrap silverware to address that deficit. Ms. Christophe and Mr. Nagasamudram explained persuasively what Student's unique needs were in January 2013, Student's present levels of performance, and how the goals would permit Student to make meaningful educational progress. The opinions of Ms. Christophe, a credentialed teacher of students with severe disabilities, and Mr. Nagasamudram, a highly



qualified speech and language pathologist with extensive experience in teaching emerging functional communication skills, were given more weight than those of Ms. Sanchez and Student's stepsister, who are behaviorists and neither credentialed special education teachers nor speech pathologists.

*ISSUE 2(b)(iii): STATEMENT OF SUPPLEMENTARY AIDS AND SERVICES*

49. The weight of the evidence established that the statement in the September 26, 2012 IEP of supplementary aids and services was sufficient. The IEP document, read as a whole in conjunction with the reports of Student's present levels of performance, annual goals, and such other information as the IEP's statement that Student needs small group instruction with a curriculum centered on functional life skills, communication skills, and functional academics, created a sufficient roadmap of Student's educational program.

50. Similarly, the weight of the evidence established that High School District's statement of supplementary aids and services in the January 28, 2014 IEP, that extra time and repeated instructions/directions on academic/functional skills was needed, in addition to small class size, and individualized instruction with curriculum modifications, was sufficient. The IEP document read as a whole, particularly with the extensive documentation of student's needs in the summary of assessment results and proposed functional annual goals, provided a clear picture of Student's educational program.

51. *Union's* formal written offer requirement did not mandate that school districts document supplementary aids and services with such specificity as to eliminate school district discretion in implementing those aids and services. (See *Union, supra*, 15 F.3d at p. 1526.) The IDEA does not require the IEP to include the particular instructional methodology. (71 Fed. Reg. 46,665 (Aug. 16, 2006).) IEP teams are not required to have a discussion on the research-based methods offered, or to provide documentation of those methods, as the U.S. Department of Education has determined that such a requirement is unnecessary and would be unduly burdensome to the IEP team. (*Id.*) The Education Code, section 56345, subd. (a)(4) requirement of a statement of special education and related services and supplementary aids and services mirrors the IDEA's substantive requirement that special education and services offered to a student be based upon peer-reviewed research to the extent practicable, and does not add a procedural requirement that the instructional methodologies be written into the IEP document itself.

52. In conclusion, Student did not establish that Respondents' statements of supplementary aids and services in the September 26, 2012 and January 28, 2014 IEP's were insufficient because they left to the Respondents' discretion how such services would be provided.

*ISSUE 2(b)(iv): STATEMENT OF APPROPRIATE ACCOMMODATIONS*

53. Student argues, without authority, that the statement of accommodations in the September 26, 2012 IEP was required to itemize each of the sensory tools, cues/prompts, AT

equipment and Ms. Lee's schedule of sensory breaks. Such a burden would be onerous, would deprive a credentialed teacher of flexibility to arrange the classroom schedule to best meet the needs of Student and his classmates, and would limit the ability of the occupational therapist consulting with the classroom to change strategies for the benefit of Student. This decision declines to impose such a requirement.

*ISSUE 2(b)(v): NATURE AND LOCATION OF SERVICES*

54. The weight of the evidence established that the September 26, 2012 IEP sufficiently specified the type of services offered, including specialized academic instruction, adaptive physical education and speech therapy, and sufficiently identified each service as being delivered in a separate classroom for that purpose. However the IEP did not sufficiently state the nature, otherwise known as the delivery model, of the services. The IEP did not specify whether the services were to be provided in a group, in a small group, individually or on a consultation basis. The testimony of Respondents' witnesses that the computerized IEP program used by Respondents displayed that information on the screen, but not in print, was credible. However, it does not overcome the school districts' duty to document the services offered with sufficient specificity for Parent, who does not have access to Respondents' computer system, to understand what was offered, and for any other school district to which Student might transfer to understand the offer.

55. Nonetheless, as discussed in detail at Issue 3, Respondents provided Student with a FAPE at all times at issue. Parent was present at all IEP team meetings, and participated in the decisions regarding the type, frequency and duration of services, as well as the delivery model. Parent was aware of the change in speech services in the January 28, 2014 IEP, which was prominently referenced in the complaint and a significant part of Parent's motivation in seeking due process. On these particular facts, the failure to designate the delivery model on the IEPs constituted a procedural violation that did not impede the child's right to a FAPE, significantly impede the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or cause a deprivation of educational benefits.

56. In summary, Student failed to meet his burden of proving by a preponderance of the evidence that the September 26, 2012 and January 28, 2014 IEP documents were insufficient, except as to the designation of the nature, or delivery mode, of services. However, as to that procedural error, Student failed to meet his burden of establishing that the procedural error resulted in a denial of FAPE.

*Issue 2(c): Copies of Student's Educational Records and Procedural Rights*

57. Student contends that he was denied a FAPE by Respondents' failure to timely provide a complete copy of Student's educational records in response to his June 9, 2014 written request until July 7, 2014. Student also contends that he was not provided with copies of his services logs (speech, teacher, physical therapy and adaptive physical education), test protocols, and the August 8, 2014 IEP, until evidence binders were

exchanged in preparation for the due process hearing. Student also contends that he was not given copies of his procedural rights. Respondents contend that they provided Parent with copies of his procedural rights and complied with Student's records request, and that any delay in receipt of educational records is due to (i) Student's failure to make the request to High School District or County, and (ii) an inadvertent and reasonable error in mailing the documents to the address on the letterhead of Student's attorney.

#### APPLICABLE LAW

58. To guarantee parents the ability to make informed decisions about their child's education, the IDEA grants parents of a child with a disability the right to examine all relevant records relating to their child's "identification, evaluation and educational placement." (20 U.S.C. §1415(b)(1).) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing, or resolution session. (See 34 C.F.R. §300.613(a)) The right to inspect and review education records under this section includes: (1) the right to a response from the participating agency to reasonable requests for explanations and interpretations of the records; (2) the right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and (3) the right to have a representative of the parent inspect and review the records. (See 34 C.F.R. §300.613(b).) Although federal regulations to implement the IDEA state that in no case shall educational records be provided more than 45 days after the request has been made, California law states parents have the right to receive copies of all school records within five business days after parents make a request. (34 C.F.R. § 300.613(a); Ed. Code, §56504.)

59. Education records under the IDEA are defined by the federal Family Educational Rights and Privacy Act (FERPA). (20 U.S.C. § 1232; 34 C.F.R. § 99.3.) Education records include "records, files, documents, and other materials" containing information directly related to a student, other than directory information, which "are maintained by an educational agency or institution or by a person acting for such agency or institution." (20 U.S.C. § 1232g(a)(4)(A); Ed.Code, § 49061, subd. (b).) Pupil or education records maintained by a school district employee in the performance of his or her duties include those "recorded by handwriting, print, tapes, film, microfilm or other means." (Ed. Code, §§ 49061, 56504.) Pupil or education records do not include "records of instructional, supervisory, and administrative personnel...which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." (20 U.S.C. § 1232g(a)(4)(b)(i); Ed. Code, § 49061, subd. (b).)

60. The United States Supreme Court in *Owasso Ind. School Dist. v. Falvo* (2002) 534 U.S. 426 [122 S. Ct. 934, 151 L.Ed.2d 896] (*Falvo*), after conducting an analysis of FERPA provisions related to education records, determined that not every record relating to a student satisfies the FERPA definition of "education records." Specifically, the Supreme

Court examined the FERPA provision that requires educational institutions to “maintain a record, kept with the education records of each student” (i.e., 20 U.S.C. § 1232g(b)(4)(A)), that “list[s] those who have requested access to a student’s education records and their reasons for doing so.” (*Falvo*, *supra*, 534 U.S. at p. 434.) The Court concluded that because this single record must be kept with the education records, “Congress contemplated that education records would be kept in one place with a single record of access.” (*Id.*) The Court further concluded that “[b]y describing a ‘school official’ and ‘his assistants’ as the personnel responsible for the custody of the records, FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar...”. (*Id.* at pp. 434-435.) The Court then found that individual assignments handled by many student graders in their separate classrooms were not student records. (*Id.*)

61. In *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742 (*BRV*), when determining whether or not an investigative report, which identified students in connection with alleged misconduct by a school district superintendent, was an education record, the Court of Appeal conducted an analysis of the “scant” judicial authority interpreting what constituted an education record. (*Id.* at pp. 751-755.) The Court of Appeal, citing *Falvo*, agreed with the Supreme Court, and stated that “the statute was directed at institutional records maintained in the normal course of business by a single, central custodian of the school. Typical of such records would be registration forms, class schedules, grade transcripts, discipline reports, and the like.” (*Id.* at pp. 751-754.) The Court of Appeal then found that the investigative report, “which was not directly related to the private educational interests of the student,” was not an educational record, “as the report was not something regularly done in the normal course of business,” and “was not the type of report regularly maintained in a central location along with education records...in separate files for each student.” (*Id.* at p. 755.)

62. In *S.A. ex rel. L.A. v. Tulare County Office of Education* (N.D.Cal. Sept. 24, 2009) 2009 WL 3126322, *aff’d*, *S.A. v. Tulare County Office of Education* (N.D. Cal. October 6, 2009) 2009 WL 3296653, the district court found that school district e-mails concerning or personally identifying a student that had not been placed in his permanent file were not educational records as defined under FERPA. The court, citing *Falvo*, stated that Congress contemplated that educational records be kept in one place with a single record of access to those records. Because the e-mails pupil requested had not been placed in his permanent file, and were therefore not “maintained” by the school district, the e-mails were not educational records and the school district was therefore not required to produce them under a request for student records under the IDEA.

63. At each IEP team meeting, a school district must inform the parent of state and federal procedural safeguards. (Ed. Code, § 56500.1, subd. (b).) The school district must also provide the parent with a copy of procedural rights at the time of revision of the IEP. (Ed. Code, § 56321, subd. (a).)

64. In the event of a procedural violation, a denial of FAPE may only be found if that procedural violation impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE, or caused deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).)

#### ANALYSIS

65. As to teacher notes on behavior and progress, relevant educational records are limited to documents ordinarily maintained in the centralized cumulative file of Student by a central registrar, and do not include records created or maintained by classroom teachers. The data sheets of Ms. Lee, Ms. Christophe and Ms. Bradley regarding Student's behaviors, or his performance on his goals and objectives, were of their own design and were used and accessible only to them and their paraeducators, and so were not educational records. As such, County was not obligated to produce these data sheets in response to Student's generic records request. Similarly, the logs kept by Student's service providers and not shared with other County personnel or maintained in Student's cumulative file did not need to be produced. Although County provides parents with copies of service logs on request, County reasonably did not interpret Student's request for a category of documents entitled "confidential status logs" as a request for service logs.

66. County responded to the records request one day after it was received and forwarded by High School District. The delay in Student's receipt of educational records was inadvertent, as County reasonably sent the records to the address in the letterhead of the records request. The short 30-day delay in Student's receipt of the documents from June 9 through July 7, 2014 was a procedural violation of the five-day response time that did not result in a denial of FAPE to Student.

67. As to Parent's notice of procedural rights, the weight of the evidence established that Parent was timely advised, and given copies of, special education procedural safeguards and parent rights at the beginning of the 2012-2013 and 2013-2014 school years. Parent acknowledged his receipt of the procedural safeguards and parent rights at the time of each IEP when he initialed the appropriate sections of the September 26, 2012, August 16, 2013, February 15, 2013 and January 28, 2014 IEP's. Parent did not present any persuasive evidence that he had not received the documents for which he had acknowledged receipt. The evidence established that Parent was advised of his parental rights and annually received copies of procedural safeguards

#### *Issue 2(d): Prior Written Notice*

68. Student contends that he did not receive prior written notice of a change in placement in August 2014 from the County class at Hesperia Junior High School to the class at Victor Valley High School.

## APPLICABLE LAW

69. The IDEA requires an educational agency provide “prior written notice” whenever the agency proposes or refuses to initiate or change “the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education.” (20 U.S.C. § 1415(b)(3); see also 34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (a).) The notice must contain: (1) a description of the action proposed or refused by the agency, (2) an explanation for the action, and (3) a description of the assessment procedure or report which is the basis of the action. (34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (b).)

70. The procedures relating to prior written notice “are designed to ensure that the parents of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to these decisions.” (*C.H. v. Cape Henlopin School Dist.* (3d Cir. 2010) 606 F.3d 59, 70.) When a violation of such procedures does not actually impair parental knowledge of or participation in educational decisions, the violation is not a substantive harm under the IDEA. (*Ibid.*)

71. California regulations define “specific educational placement” as “that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs,” as specified in the IEP. (Cal. Code Regs., tit. 5, § 3042.) However, many cases interpreting the IDEA acknowledge that if a school (or classroom) is closed, the child may be provided a comparable program in another location without it constituting a change of placement under the IDEA. (See *McKenzie v. Smith* (D.C. Cir. 1985) 771 F.2d 1527, 1533; *Knight v. District of Columbia* (D.C. Cir. 1989) 877 F.2d 1025, 1028; *Weil v. Board of Elementary & Secondary Education* (5th Cir. 1991) 931 F.2d 1069, 1072-1073; see also *Concerned Parents & Citizens for Continuing Education at Malcolm X (PS 79) v. New York City Board of Education* (2d Cir. 1980) 629 F.2d 751, 754, cert. den. (1981) 449 U.S. 1078 [101 S.Ct. 858, 66 L.Ed.2d 801]; *Tilton v. Jefferson County Bd. of Education* (6th Cir. 1983) 705 F.2d 800, 805, cert. den. (1984) 465 U.S. 1006 [104 S.Ct. 998, 79 L.Ed.2d 231].)

## ANALYSIS

72. The evidence did not establish that High School District was required to provide Parent with prior written notice regarding the change of location of the County moderate/severe program due to campus closure. Student was moved by County from one of their moderate/severe classrooms to a virtually identical classroom due to loss of a facility. Accordingly, the change in location did not constitute a change in Student’s educational placement or provision of FAPE necessitating prior written notice.

73. Parent’s testimony that Student would not be able to interact with children his own age at Victor Valley High School, and so constituted a change of educational placement, was unpersuasive. Half of Ms. Bradley’s students were middle school students.

Additionally, Student historically required facilitation to interact with his classroom peers, and Ms. Bradley's classroom offered both middle school peers and a credentialed teacher and trained paraeducators to facilitate interaction with those peers. The evidence did not show that this shift in the ages of the students in his classroom significantly altered Student's program or his opportunities for peer interaction.

74. The letter from a County principal notifying Parent of the classroom location and transportation schedule change did not meet the formal prior written notice requirement of explaining that the action was due to a relocation of the moderate/severe classroom. However, Parent was advised as early as the IEP team meeting of January 28, 2014, that County might lose the Hesperia Junior High School classroom facilities, and was seeking to open a moderate/severe classroom at another location. Parent received the letter with the new location before the start of the 2014-2015 school year, and had sufficient notice of this action affecting his child to provide him with an opportunity to object to the decision. As discussed at Issue 3, the relocated classroom also provided Student with a FAPE. Accordingly, had prior written notice been required, the failure to provide such notice did not deny Student a FAPE because it did not impede Student's right to a FAPE, significantly impede Parent's opportunity to participate in the decision making process regarding the provision of a FAPE, or cause deprivation of educational benefits.

*Issue 3: FAPE in IEP's of September 26, 2012, August 16, 2013, and January 2014*

75. Student contends that the services and placement offered in the September 26, 2012, August 16, 2013 and January 28, 2014 IEP's were substantively inappropriate. Specifically, Student argues that he did not make any identifiable progress from September 2012 through September 2014, and that due to its failure to timely and appropriately assess Student in all areas of suspected disability, the IEP teams lacked sufficient information to craft appropriate educational programs. District contends that all three IEP's meet the FAPE requirement of the IDEA as interpreted by *Rowley* by providing Student access to an education that is reasonably calculated to "confer some educational benefit."

#### APPLICABLE LAW

76. For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314; 20 U. S.C. § 1401(9).) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) The IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139

[The IDEA does not provide for an “education . . . designed according to the parent’s desires”], citing *Rowley, supra*, 458 U.S. at p. 207; see also *Miller v. Bd. of Education of the Albuquerque Public Schools* (D.N.M. 2006) 455 F.Supp.2d 1286, 1307-1309; *aff’d on other grounds, Miller v. Bd. of Education of the Albuquerque Public Schools* (10th Cir. 2009) 565 F.3d 1232.)

77. No one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student’s failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School Dist.* (2nd Cir. 1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist, No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450; *Perusse v. Poway Unified School Dist.* (S.D. Calif. July 12, 2010, No. 09 CV 1627) 2010 WL 2735759.)

78. A school district’s determinations regarding special education are based on what was objectively reasonable for the district to conclude given the information the district had at the time. A district cannot “be judged exclusively in hindsight” but instead, “an IEP must take into account what was, and what was not, objectively reasonable...at the time the IEP was drafted.” (*Adams, supra*, 195 F.3d at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

79. Neither Congress, the U.S. Department of Education, nor any statute or regulation has created substantive requirements for a behavior intervention plan as contemplated by the IDEA. (*Alex R. v. Forrestville Valley Community Unit Sch. Dist. #221* (7th Cir. 2004) 375 F.3d 603, 615.) The IEP team must consider the use of positive behavioral interventions and supports, and other strategies, but the implementing regulations of the IDEA do not require the team to use any particular method strategy or technique. (71 Fed. Reg. 46,683 (Aug. 14, 2006).)

80. In California, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies to address the behavior. (Ed. Code, § 56341.1, subd. (b)(1).) A behavior intervention is “the systematic implementation of procedures that result in lasting positive changes in the individual’s behavior.” (Cal. Code Regs., tit. 5, § 3001, subd. (d).) It includes the design, evaluation, implementation, and modification of the student’s individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student’s behavior through skill acquisition and the reduction of problematic behavior. (*Ibid.*)



81. Although failure to develop a behavior intervention plan where required can deny FAPE, the lack of a written or formal plan, specifically called a behavior intervention plan, is not a per se denial of FAPE. (*Neosho R-V School District v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *E.H. v. Board of Education of Shenendowa Central School District* (2d Cir. 2009) 361 Fed.Appx. 156, 160 (cert. denied (2010) 559 U.S. 1037, 130 S.Ct. 2064.)

#### ANALYSIS

82. Applying the *Rowley* standard, the weight of the evidence established that the September 26, 2012, August 16, 2013 and January 28, 2014 IEP's were each individually designed to meet Student's unique needs and reasonably calculated to provide Student with educational benefit.

#### *SEPTEMBER 26, 2012 IEP*

83. As to the September 26, 2012 IEP, Student contends that a FAPE required (i) additional speech and language services, (ii) behavior services, (iii) OT services, (iv) formalized assistive technology services, and (v) physical therapy services.

84. Ms. Lee testified persuasively that Student made good progress between September 2011 and September 2012. Student had partially met all his previous year's goals except for consistently identifying his name. This progress was not minimal. The evidence established that because Student's cognitive abilities were at the sensori-motor or pre-conceptual thought level and Student had significant learning challenges, his progress would be slow.

85. Ms. Lee, a teacher with extensive experience teaching nonverbal students, persuasively explained that children learn at different rates and may be making substantial progress even if annual goals are not met. Her opinion that the new, more advanced goals adopted by the September 26, 2012 IEP team addressed Student's skill deficits and educational needs in coordination, balance, language arts, mathematics, communication, visual motor integration, and fine motor skills was convincing. This opinion was also based upon a familiarity with Student's abilities, performance levels and learning styles in the classroom. Ms. Lee and Mr. Nagasamudram persuasively opined that Elementary School District's offer of placement and services was designed to meet Student's unique needs, comported with Student's IEP, and was reasonably calculated to provide Student with some educational benefit in the least restrictive environment.

86. The weight of the evidence did not establish that Student required additional speech services in September 2012. Although Student had made very little progress on his communication goal, the evidence established that his progress was commensurate with his abilities. Mr. Nagasamudram convincingly explained that that Student received speech and language support, particularly with the use of assistive technology embedded in the moderate/severe program and "real time" daily practice in the classroom, sufficiently supported Student's individualized speech sessions to meet Student's speech and language

needs and help him to acquire functional communication. His opinion that increased individualized services would not provide additional educational benefit in September 2012 was persuasive.

87. The evidence did not establish that Student required one-to-one assistance, or any additional behavior support, in Ms. Lee's class. The adult to student ratio was already so small that Student had direct supervision when doing daily classroom activities and received individualized instruction daily on his goals. Parent's fear that Student would choke without a one-on-one assistant to watch him seemed unreasonable in light of the fact that Student had not had a choking incident at school, and there were three to five adults in the classroom to watch only three students who ate by mouth. Student did not have behaviors that significantly interfered with his learning. He did not demonstrate that he needed behavior support beyond what was offered in the classroom. A school district is not required to address behavior problems which occur outside of school, if the student demonstrates educational progress in the classroom. (*San Rafael Elementary Sch. Dist. v. California Special Educ. Hearing Off.* (N.D.Cal. 2007) 482 F. Supp.2d 1152, 1160-1164).

88. Ms. Lee systematically implemented procedures that resulted in positive changes in Student's behavior by using praise, toys and high-fives to motivate Student, as evidenced in her progress logs. Although this was not a behavior intervention plan as that term is typically understood, it was designed and implemented as part of Student's instruction to produce improvement in Student's behavior through skill acquisition. Student's goals to acquire functional language skills and learn toileting also addressed arguably problematic behavior, such as leaving his seat and soiling his diaper. Witnesses and documentary evidence consistently mentioned Student's motor stereotypy, but testimony differed widely on the severity of the behavior. The testimony of Respondents' witnesses that Student would stop his motor stereotypy when verbally prompted to do so, and Mr. Kenyon's testimony that the motor stereotypy did not interfere with Student's learning, persuasively showed that Student did not need a formal behavior intervention plan to address that behavior.

89. Parent also contends that Student needed a one-on-one assistant to implement individualized applied behavior analysis instruction in the classroom. Ms. Sanchez' testimony that Student learned best when applied behavior analysis methodology was used was unpersuasive in light of Student's lack of success with applied behavior analysis instruction on PECS in the home. However, even if Student did learn best with one-on-one instruction, Elementary School District was not required to provide Student with the best instruction, or Parent's preferred instructional methods. As long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 208.) This rule is applied in situations involving disputes regarding choice among methodologies for educating children with autism. (See *Adams, supra* 195 F.3d at 1149; *Pitchford v. Salem-Keizer School District* 155 F.Supp.2d 1213, 1230-32 (D. Ore. 2001); *T. B. v. Warwick School Commission* (1st Cir. 2004) 361 F.3d 80, 84 (*T.B.*).) Courts are ill-equipped to second-guess reasonable choices that school districts have made among

appropriate instructional methods. (*T.B., supra*, 361 F.3d at p. 84.) Ms. Sanchez conceded that Student would learn well in a classroom with a low teacher to student ratio, which was present in Ms. Lee's classroom.

90. The weight of the evidence did not establish that Student required individual occupational therapy in September 2012. Student had a sensory diet implemented by classroom staff with regular consultation with an occupational therapist. Student's occupational therapist, and an occupational therapy expert, Dawn Arias, did not identify any fine motor, visual motor or sensory integration needs not already known to the IEP team. She proposed goals of improving hand strength and dexterity to access classroom materials, to improve tolerance for educational activities, and to decrease self-stimulatory behaviors without substantive information on Student's cognitive delays, classroom environment, or educational program. Respondents' witnesses testified persuasively that Student's fine motor, visual motor and sensory needs were being met by the embedded components of Ms. Lee's classroom. Ms. Arias' opinion that Student required weekly occupational therapy services, in addition to embedded services, was unpersuasive and based on insufficient information.

91. The weight of the evidence did not establish that Student required formal assistive technology services in addition to the availability of assistive technology and instruction that he received in Ms. Lee's classroom. Ms. Lee and Mr. Nagasamudram convincingly explained that they systematically introduced low- and high-tech assistive technology to Student, and that additional assistive technology services were not necessary for Student to access his curriculum. Student did not introduce contrary evidence sufficient to contradict their opinions.

92. The weight of the evidence did not establish that Student required physical therapy or additional adaptive physical education services in September 2012. Ms. Lee and Ms. Pollard persuasively testified that Student's gross motor needs were being met in Ms. Lee's classroom. Student did not call a physical therapist to contradict Ms. Wahl's physical therapy discharge report. The testimony of Parent and Student's stepmother that at home Student gripped Parent's shirt when walking, or walked on his heels with upraised toes, did not outweigh the observations of Respondents' witnesses that in school Student walked back and forth to the cafeteria carrying a tray, had adequate balance to turn on a vacuum with one foot, and readily walked with flat feet when verbally prompted. The family observations in the home environment fell short of demonstrating that Student needed physical therapy or additional adaptive physical education services to access his education.

*AUGUST 16, 2013 IEP*

93. As to the August 16, 2013 IEP, Student contends that it denied him a FAPE because the IEP failed to offer behavior services.

94. For the same reasons discussed with regard to the September 26, 2012 and January 28, 2014 IEP's, the evidence did not establish that Student required a behavior plan, a one-to-one aide or individualized applied behavior analysis instruction at any time at issue.

*JANUARY 28, 2014 IEP*

95. As to the January 28, 2014 IEP, Student contends that a FAPE required (i) additional speech and language services, (ii) behavior services, (iii) occupational therapy services, (iv) formalized assistive technology services, and (v) physical therapy services.

96. Ms. Christophe testified persuasively that Student made good progress between September 2012 and January 2014. By January 2014, Student had met several annual goals with assistance, and made partial progress on the others. As discussed at Issue 2(b)(ii), Student's goals in the January 28, 2014 IEP addressed his skill deficits and were appropriate. Ms. Christophe and Mr. Nagasamudram persuasively opined that High School District's offer of placement and services in the January 28, 2014 IEP was designed to meet Student's unique needs, comported with Student's IEP, and was reasonably calculated to provide Student with some educational benefit.

97. The evidence did not establish that Student required individual speech services as part of his January 28, 2014 IEP. As discussed earlier, Student received speech and language support, particularly with the use of assistive technology, embedded in his classroom program, and Student benefitted more from real time practice communicating his wants and needs in the classroom than from individualized speech sessions. The change in services from direct speech therapy in isolation to consultation with Student's teacher and staff to help them support Student in using multiple modes of communication all day, every day, was an effective means of targeting Student's acquisition of functional communication. Mr. Nagasamudram testified passionately and persuasively that Student no longer benefitted from individualized speech sessions, particularly as he lacked motivation to communicate in the therapy room; that a total communication approach was more effective in eliciting functional language from Student; and that the level of consultation services offered was designed to provide Student with educational benefit. Private speech pathologist Ms. Williams recommended an hour of weekly individualized speech services because Student was still without a functional means of communication in February 2015; however, she did not take into account Student's developmental levels or the progress he had made over the past year that had enabled him, during her assessment, to make requests with gestures and signs, and to respond to simple requests. Ms. Williams also recommended that Student's receptive and expressive language skills be targeted using a total communication approach with nonverbal communication modes such as gestures and signs, which approach was already taking place throughout the day, and well in excess of one hour per week, under the consultation model offered in the January 28, 2014 IEP. Ms. Williams' opinion that the frequency and duration of consultation offered would be inadequate for Student to develop functional communication was less persuasive than the opinion of Mr. Nagasamudram that the real time total communication approach was the best means of developing functional communication for Student. Ms. Williams' opinion was based on very limited information

concerning Student's educational program and speech services history, and had little or no information concerning Student's cognitive development and historical lack of motivation. Mr. Nagasamudram had significant experience working with Student and collaborating with Student's classroom teachers, and was familiar with Student's educational program, past speech assessments, and progress on speech goals, and his testimony that the nature, type, frequency and duration of speech services offered in the January 28, 2014 IEP met Student's language and communication needs was persuasive and convincing.

98. Student failed to establish that he required applied behavior analysis instruction or one-on-one assistance in Ms. Christophe's class. The adult to student ratio in Ms. Christophe's class was sufficiently low to provide Student with continuous supervision and frequent individualized instruction. Student made progress with one-to-two and one-to-three instruction, and sufficient staff was present to ensure Student ate slowly and did not choke while eating. Ms. Christophe was able to redirect Student from walking on his toes or tapping his hands with verbal prompts and the use of a sensory diet and sensory breaks. There was no persuasive evidence that these behaviors interfered with Student's learning, or required one-on-one assistance throughout the day for redirection or safety. By October of the 2014-2015 school year, both Ms. Sanchez and Mr. Kenyon observed that Student was able to attend to, and participate in, classroom activities without the assistance of a dedicated one-on-one behavior aide. Student did not demonstrate that he needed behavior support beyond that offered in the County's moderate/severe classroom.

99. The evidence did not establish that Student needed individualized occupational therapy in January 2014. Ms. Christophe testified persuasively that Student's fine motor, visual motor and sensory needs were met by the embedded components of Ms. Christophe's classroom, and individualized occupational therapy services were not required for Student to receive educational benefit. Ms. Arias recommended that Student receive occupational therapy "pushed in" to the classroom, and proposed goals for increasing tolerance for classroom activities and ability to attend. However, in the County's program, Student demonstrated an ability to tolerate classroom activities for over ten minutes, his sensory breaks and diet decreased his tapping and fidgeting behaviors, and Student possessed the hand strength to access classroom materials. Therefore the issues that Ms. Arias opined needed to be addressed were already addressed in Student's program through embedded occupational therapy consult, and Student did not require additional occupational therapy.

100. The weight of the evidence did not establish that Student required formal assistive technology services in addition to the availability of assistive technology and instruction he received in Ms. Christophe's classroom. Ms. Christophe and Mr. Nagasamudram convincingly testified that they systematically introduced low and high tech assistive technology to Student, and that additional assistive technology services were not necessary for Student to access his curriculum. Student did not provide evidence to contradict their opinions.

101. The weight of the evidence did not establish that Student required physical therapy or additional adaptive physical education services in January 2014. Ms. Christophe and Ms. Pollard persuasively testified that Student's gross motor needs were being met in Ms. Christophe's classroom, and Ms. Christophe testified in detail about Student's progress on adaptive physical education goals and his ability to access the classroom and school setting. Student did not call a physical therapist to contradict Ms. Wahl's physical therapy discharge report, or to explain how Student's gross motor needs had changed since that discharge report had been presented. The testimony of Parent and Student's stepmother that Student demonstrated insecurity or imperfect balance at home did not outweigh the observations of Respondents' witnesses that in school Student walked satisfactorily in the classroom and on campus, and would walk flat-footed with one verbal prompt.

102. In summary, the Respondents' witnesses persuasively explained that the moderate/severe County program, with its embedded components, and the level of speech and adaptive physical education services offered in the September 12, 2012, August 16, 2013 and January 28, 2014 IEP's were sufficient to permit Student to make progress on his goals and obtaining meaningful educational benefit.

103. The weight of the evidence did not demonstrate that High School District should have offered Student a one-to-one aide, or applied behavior analysis individualized instruction. Student obtained educational benefit during the 2012-2013 and 2013-2014 school years in the small, structured classroom with the support of credentialed and experienced special education teachers, their paraeducators and embedded classroom services.

104. The weight of the evidence established that the September 26, 2012, August 16, 2013 and January 28, 2014 IEP's offered Student sufficient special education and services to meet his needs and enable him to receive educational benefit. Accordingly, Student failed to meet his burden of proving that he was denied a FAPE because Respondents' failed to provide IEP's reasonably calculated to provide educational benefit to Student.

## ORDER

All of Student's requests for remedies are denied.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District prevailed on all issues.

## RIGHT TO APPEAL THIS DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h). Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: May 7, 2015

/s/

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ALEXA J. HOHENSEE  
Administrative Law Judge  
Office of Administrative Hearings